

An Award was entered in this case on January 24, 1994. Respondent appealed and the hearing was held before the Appeals Board on April 14, 1994. The Appeals Board did not issue its decision within thirty (30) days after the oral argument and on May 23, 1994, claimant made demand upon respondent for payment pursuant to the original Award. When respondent did not commence payment of benefits within the twenty (20) days after the demand, claimant filed a Motion for Penalties pursuant to K.S.A. 44-512a. After a hearing on claimant's Motion, the Administrative Law Judge entered an Order for Penalties at the rate of \$100 per week beginning May 21, 1994, and for attorney fees in the amount of \$250.

The decision in this case turns on construction and application of K.S.A. 44-551(b)(2) which provides in pertinent part as follows:

“(A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. The orders of the board on any acts, findings, awards, decisions, rulings or modifications of findings or awards shall be issued within 30 days from the date arguments were presented by the parties.

“(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (b)(2)(A), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued”

Respondent argues that the obligation to commence payments thirty (30) days after arguments by the parties relates only to appeals from preliminary orders. In support of its argument, respondent points out that the first sentence of K.S.A. 44-551 (b)(2)(A) relates to appeals from preliminary orders. The second sentence then contains the requirement for orders by the Appeals Board to be issued within thirty (30) days after arguments are presented by the parties. Respondent argues it is most logical to construe subsection (b)(2)(A) as relating to a single topic, appeals from preliminary orders.

Subsection (b)(2)(B), which contains the requirement for commencing payments, relates back to subsection (b)(2)(A), by requiring payments to begin when the decision is not issued in the thirty (30) day period referred to in subsection (b)(2)(A). Respondent argues that the obligation to issue decisions within thirty (30) days relates only to appeals from preliminary orders and the obligation to begin payments, therefore, also relates only to preliminary orders.

For two reasons, the Appeals Board does not agree with respondent's construction of K.S.A. 44-551. First, the language of the sentence which requires that orders be entered by the Appeals Board thirty (30) days from the date of argument appears on its face to apply to more than preliminary orders. The sentence refers to the orders of the Appeals Board on “any acts, findings, awards, decisions, rulings or modifications of findings or awards” Second, K.S.A. 44-534a contains a specific description of the obligations during pendency of appeals from preliminary orders. That statute provides:

“If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award.”

The construction suggested by respondent would render K.S.A. 44-551(b)(2) and K.S.A. 44-534a inconsistent.

Respondent counters by arguing that appeals from preliminary orders may be pursued by two separate avenues, one under K.S.A. 44-551 and a second under K.S.A. 44-534a. Respondent argues that these two provisions contain two separate standards for review on an appeal from preliminary orders depending upon the nature of the issue appealed. Respondent then argues that in one case, specifically appeals under K.S.A. 44-534a, the appeal does not stay the order while in the other, appeal of a preliminary order under K.S.A. 44-551, the obligation to commence payments begins thirty (30) days after arguments to the Appeals Board.

The Appeals Board does not construe K.S.A. 44-551(b) and K.S.A. 44-534a as separate avenues of appeal from preliminary orders. The Appeals Board has and does construe the two statutes as interrelated consistent descriptions of grounds for appeal from preliminary orders. K.S.A. 44-551 provides that no appeal may be taken from a preliminary order unless the parties allege the Administrative Law Judge exceeded his or her jurisdiction. K.S.A. 44-534a provides examples of issues which, when challenged, constitute allegations that the Administrative Law Judge exceeded his or her jurisdiction and expressly authorizes appeal from preliminary orders in those instances. The Appeals Board therefore understands K.S.A. 44-534a to indicate the application for review does not stay the obligation to provide benefits in any appeal from a preliminary order. The provisions of K.S.A. 44-551 must, therefore, relate to appeals from awards and other orders and requires payment, pursuant to those awards and other orders, thirty (30) days after arguments are presented to the Appeals Board.

Respondent points to several cases relating to finality of awards. Those cases were decided before the 1993 amendments creating the Appeals Board. At that time, the first stage of the appeal was to the Kansas Workers Compensation Director. K.S.A. 44-551 (Ensley). Those cases stand for the proposition that, under the previous appeal procedure, an award was not final until either the appeal time had run or the appeal was determined by the Director. See Harper v. Coffey Grain Co., 192 Kan. 462, 388 P.2d 607 (1964). The Appeals Board does not consider these cases to be dispositive of the issue here. Under the new procedure the Appeals Board takes the place of not only the Director, but also for the District Court in appeals from workers compensation awards. Statutes in effect at the time of those decisions did require payments to be made while a case remained pending on appeal before the District Court. See K.S.A. 1992 Supp. 44-556. The statutory language at issue here was added by the Legislature in 1993. It relates specifically and uniquely to the appeals before the Workers Compensation Appeals Board. The prior decisions do not consider or now control interpretation of K.S.A. 44-551.

The Appeals Board notes, finally, respondent has argued in support of its suggested construction of K.S.A. 44-551 that the construction adopted by the Administrative Law Judge, and now approved here, may leave respondent without any means of reimbursement if the Appeals Board reverses an award. As respondent points out, K.S.A. 44-534a authorizes reimbursement by the Kansas Workers Compensation Fund of temporary total and medical benefits paid either voluntarily or pursuant to order. K.S.A.

44-556 provides for reimbursement by the Fund for payments made while an action is pending on appeal to the Court of Appeals. The absence of any similar accountability for overpayment of permanent partial benefits while a case is pending on appeal to the Appeals Board is, according to respondent, further argument for limiting the obligation to make payments pending appeal to the Appeals Board to appeals involving preliminary orders. The absence of such accountability does give reason for pause in considering respondent's arguments. However, the Appeals Board finds more persuasive the considerations described above favoring the construction of K.S.A. 44-551 to require the payment on final awards commence thirty (30) days after arguments are presented to the Appeals Board. If, and the Appeals Board does not rule on the issue here, there is no accounting for such an overpayment, this is a matter to be considered by the Legislature, not used to strain an otherwise reasonable construction of the statutory provisions of K.S.A. 44-534a and K.S.A. 44-551.

In cases where the Appeals Board conducts a hearing for oral arguments to be presented, the date of the hearing should be considered the date arguments are presented by the parties to begin the thirty (30) days. Payments are not required to be made for any period before the first day after the thirty (30) days. Payments must, however, continue thereafter until the order of the Appeals Board is issued. In this case, the hearing was held April 14, 1994, and the Appeals Board issued its order September 23, 1994. Payments under the original Award by the Administrative Law Judge should, therefore, have commenced effective May 15, 1994 and continued to September 23, 1994. The Appeals Board therefore finds that the Award of Penalties made in this case by the Administrative Law Judge should be affirmed.

(2) The Appeals Board finds that the Award of attorney's fees should be reversed.

While the Appeals Board agrees that in post-award proceedings the Administrative Law Judge does have jurisdiction to award attorney's fees, it appears in this case no request for attorney's fees was made and no evidence was offered as to the appropriateness of any particular amount of attorney's fees. Under the circumstances, the Appeals Board finds and concludes that no award of attorney's fees should be made and that portion of the Order is, therefore, reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark assessing penalties pursuant to K.S.A. 44-512a should be affirmed, and that portion of the Order awarding attorney's fees pursuant to K.S.A. 44-536 should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William A. Taylor III, Winfield, KS
Gregory D. Worth, Lenexa, KS
Orvel B. Mason, Arkansas City, KS
John D. Clark, Administrative Law Judge
George Gomez, Director